Supreme Court, U.S.
FILED

No. 931886 MAY 25 1994

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

T. I. CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

KIEWIT EASTERN COMPANY, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

VICTOR P. STABILE
[Counsel of Record]
GERALD E. BURNS, III
DILWORTH, PAXSON, KALISH
& KAUFFMAN
305 N. Front Street, Suite 403
Harrisburg, PA 17101
(717-236-4812)

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Does the Disadvantaged Business Enterprise ("DBE") program, as established by Congress to remedy discrimination faced by socially and economically disadvantaged persons on all federally-aided highway contracts and as implemented through United States Department of Transportation regulations, permit a prime Contractor to terminate a DBE solely for the Contractor's convenience when the DBE is satisfactorily performing its work?

PARTIES TO THE PROCEEDING

Petitioner herein, who was the appellant below, is T.I. Construction Company, Inc. ("T.I."). T.I. has no parent or subsidiary company. Respondents in this Court, who were appellees below, are Kiewit Eastern Company, Perini Corporation and Kiewit/Perini Joint Venture (collectively referred to herein as "Kiewit"). T.I. does not know of any parent company or non-wholly owned subsidiary of Kiewit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS BELOW	2
JURISDICTION	2
REGULATIONS INVOLVED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
A. Legislative and Regulatory Background	4
B. The Proceedings In This Case	6
REASONS FOR ALLOWING THE PETITION	10
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Internorth, Inc. v. Department of Energy, 548 F. Supp. 987 (D.Del. 1982) 13

McCoog v. Hegstrom, 690 F.2d 1280 (9th Cir. 1982) 13

Morton v. Ruiz, 415 U.S. 199 (1974) 13

Silvis v. Heckler, 578 F. Supp. 1401 (W.D. Pa. 1984) 13

Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) 12

STATUTES/REGULATIONS

18 U.S.C. § 1961 et seq 7

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 7

28 U.S.C. § 1332(a)(1) 7

45 Fed. Reg. 31173 (Mar. 31, 1980) 11

57 Fed. Reg. 58288 (Dec. 9, 1992) 5

23 C.F.R. § 1.32(b)(5) 10

49 C.F.R. § 23.1 ..... 2, 5

49 C.F.R. § 23.43(2) 5

49 C.F.R. § 23.45(f)(2) 2, 6, 12

Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100 ... 3, 4

Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 135 ..... 3, 4

No. _____

In The

Supreme Court of the United States

October Term, 1993

T. I. CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

KIEWIT EASTERN COMPANY, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

T.I. Construction Company, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 4, 1994.

OPINIONS BELOW

The judgment order of the Court of Appeals is set forth in the Appendix hereto at pp. A-1 to A-2. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 1993 WL 382306 (E.D. Pa. 1992) and is set forth in the Appendix hereto at pp. A-3 to A-33.

JURISDICTION

The judgment of the Third Circuit was entered on April 4, 1994. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

REGULATIONS INVOLVED

49 C.F.R. § 23.1 provides, in relevant part:

> (a) *Purpose*: The purpose of this part is to carry out the Department of Transportation's policy of supporting the fullest possible participation of firms owned and controlled by minorities and women. (MBEs) in Department of Transportation programs. This includes assisting MBEs throughout the life of contracts in which they participate.
>
> * * *

49 C.F.R. § 23.45 provides, in relevant part:

Required MBE program components.

* * *

> (f) *Procedures to ascertain the eligibility of MBEs and joint ventures involving MBEs.* (1) To ensure

that its MBE program benefits only firms owned and controlled by minorities or women, the recipient shall certify the eligibility of MBEs and joint ventures involving MBEs that are named by the competitors in accordance with this subpart. Recipients may, at their own discretion, accept certifications made by other DOT recipients.

(2) Recipients shall require their prime contractors to make good faith efforts to replace an MBE subcontractor that is unable to perform successfully with another MBE. The recipient shall approve all substitutions of subcontractors before bid opening and during contract performance, in order to ensure that the substitute firms are eligible MBEs.

STATUTES INVOLVED

The Surface Transportation Assistance Act, Pub.L. No. 97-424, 96 Stat. 2097 (1982), provides in Section 105(f):

> Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act (15 U.S.C. section 637(d)) and relevant subcontracting regulations promulgated pursuant thereto.

The Surface Transportation and Uniform Relocation Assistance Act, Pub.L. No. 100-17, 101 Stat. 135 (1987), provides in Section 106(c):

> (1) GENERAL RULE – Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under Titles I, II and III of this Act or obligated under Titles I, II and III (other than Section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

STATEMENT OF THE CASE

A. Legislative and Regulatory Background

In 1983, Congress enacted the first statutory Disadvantaged Business Enterprise ("DBE") program for all United States Department of Transportation ("USDOT") financially-aided contracts, to remedy discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry.[1] The DBE program requires that USDOT establish a minimum goal of not less than 10% of all funds authorized for highway and transit assistance programs to be expended with DBEs. USDOT regulations implementing the DBE program have as their stated purpose to:

---

[1] *See* Surface Transportation Assistance Act, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100 (1982); Surface Transportation and Uniform Relocation Assistance Act, Pub. L. No. 100-17, § 106(c), 101 Stat. 135, 145 (1987).

> carry out the Department of Transportation's policy of supporting the fullest possible participation of firms owned and controlled by minorities and women, (MBEs) in Department of Transportation programs. This includes assisting MBEs throughout the life of contracts in which they participate.[2]

49 C.F.R. § 23.1.

States and their contractors that participate in contracts financed in whole or in part with Federal funds must:

> take all necessary and reasonable steps in accordance with 49 CFR part 23 to ensure that minority business enterprises have the maximum opportunity to compete for and perform contracts. . . .

49 C.F.R. § 23.43(2).

Consistent with this goal, USDOT regulations require that contractors use good faith efforts to replace a DBE, *but only if the DBE is unable to perform*:

> Recipients shall require their prime contractors to make good faith efforts to replace an MBE subcontractor that is unable to perform successfully with another MBE. . . .

---

[2] The term "MBE" (Minority Business Enterprise) has now been replaced by the term "DBE" (Disadvantaged Business Enterprise), in the USDOT regulations. *See* USDOT Notice of Proposed Rulemaking, 57 Fed. Reg. 58288 (Dec. 9, 1992).

49 C.F.R. § 23.45(f)(2). This program requirement is unambiguously repeated in the Federal Highway Administration's Disadvantaged Business Enterprise Program Administration Participant's Manual:

> The prime contractor will be allowed to substitute the originally-designated DBE(s) only if it is demonstrated to the State that the DBE(s) is unable or unwilling to perform.

App. at A-41.

B. The Proceedings In This Case

On June 14, 1988, the Pennsylvania Department of Transportation ("PennDOT") entered into a contract with Kiewit for the construction of Section 200 of I-476, in Delaware County, Pennsylvania. Pursuant to the contract, involving state-administered federal highway funds and USDOT regulations, Kiewit was required to establish a goal of DBE utilization equal to 10% of the contract price. In fulfillment of this goal, on July 1, 1988, Kiewit executed a subcontract in the amount of $2,530,611.70 with T.I., a qualified DBE, for the performance of storm drainage work.

T.I. began work on or about August 16, 1988. Disputes developed between the parties and in October, 1989, the parties met to resolve their differences. At this meeting, a release was executed by T.I. for all claims it had against Kiewit through the time of execution of the release. Thereafter, T.I. expected to complete the remainder of its subcontract work.

However, by letter dated February 23, 1990, Kiewit notified T.I. that effective March 3, 1990, T.I.'s subcontract was being terminated pursuant to Section 6 thereof. No explanation was provided with the termination notice. Section 6 of the subcontract, relating to prosecution of work, contains seven subparts. Section 6(e) provides that Kiewit may, on five (5) days written notice, terminate the subcontract, in whole or in part, solely for the Contractor's convenience. The subcontract also incorporates by reference USDOT's DBE regulations.

After pursuing without success what T.I. believed to be proper appeal procedures to challenge the termination of its subcontract, T.I. filed suit against Kiewit in the United States District Court for the Eastern District of Pennsylvania. Jurisdiction was based upon diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(1) and the existence of a federal question pursuant to 28 U.S.C. § 1331. In part, T.I.'s complaint challenged Kiewit's termination of the subcontract for convenience as violative of the DBE regulations and public policy. There was no dispute that T.I. was satisfactorily performing its work under the subcontract.

On or about May 11, 1992 Kiewit moved for partial summary judgment on T.I.'s complaint on grounds that, *inter alia*, Kiewit had lawfully terminated the subcontract pursuant to its terms and federal law.[3] *For purposes of the*

---

[3] T.I.'s Complaint included a claim under the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961, et seq. By prior Opinion and Order of the District Court, T.I.'s claims asserted under RICO were dismissed.

motion, the parties assumed that the termination was one for convenience under section 6(e) of the subcontract.

On December 9, 1992, the district court granted Kiewit's motion for partial summary judgment.[4] In rejecting T.I.'s argument that a termination for convenience, while the DBE was performing satisfactorily, violated the DBE regulations, the district court gave almost total deference to two letters written by USDOT officials in response to T.I.'s termination. The first letter, dated December 27, 1990, written by the Director of the Federal Highway Administration's ("FHWA") Office of Engineering, concluded that, because this was not a case of discrimination, neither USDOT nor the FHWA had jurisdiction over T.I.'s claim. This same letter also acknowledged that there was no dispute that T.I.'s work was satisfactory, but that the parties had disagreements on issues such as scheduling, site preparation, work to be performed and compensation. In the second letter, dated February 14, 1991, USDOT reasserted that termination for convenience was not inconsistent with DBE regulations. This letter also affirmed again that T.I.'s work was satisfactory, but that there had been "friction" between the parties.

In its decision, the district court deterred solely to these two letters while disregarding entirely other USDOT pronouncements made prior to T.I.'s termination which interpreted DBE regulations to prohibit the replacement of a DBE unless the DBE was unable or unwilling to perform. These pronouncements would preclude a termination for convenience such as occurred in

---

[4] Kiewit and T.I., through its then new counsel, eventually agreed upon a stipulation which permitted the district court to enter its final order of June 21, 1993 (A-36 - A-38) and to permit the appeal to the Third Circuit.

this case. Thus, a memo dated June 5, 1984 from L. P. Lamm, Deputy Administrator of the USDOT, to all Regional Federal Highway Administrators stated, in relevant part:

> Some concerns have been expressed with regard to instances when prime contractors have substituted DBE firms in place of those that were named for contract award purposes . . .
>
> We are providing our written position on the DBE award procedures . . .
>
> The intent of the regulations is to require the prime contractor to have a valid arrangement with the DBEs listed. *If they choose to alter this list after contract award, they must be able to demonstrate that the listed minority subcontractor is unable to perform because of default or overextension on other jobs or provide other similar justification for the State's approval. There must be a solid basis for any change. It is not intended that a contractor's ability to negotiate a more advantageous contract with another subcontractor be considered valid basis for change.*

(Emphasis added).

T.I. also produced USDOT's "DBE Program Administration Participant's Manual" issued by Thomas D. Larson, the Federal Highway Administrator. The Manual specifically addresses "Replacements/Substitutions of DBEs" at Section IV:

> *The prime contractor will be allowed to substitute the originally-designated DBE(s) only if it is demonstrated to the State that the DBE(s) is unable or unwilling to perform.* The contractor's ability to negotiate a more advantageous contract with

> another subcontractor will not be considered a valid basis for the substitution . . .
>
> Regardless of the prime contractor's DBE participation percentage (above or below the contract figure) committed at the award of the contact, the prime contractor is to exert the necessary good faith efforts to replace/substitute DBE's for those *DBE's unable or unwilling to perform during the life of the contract.*

App. at A-41 - A-42 (emphasis added).

USDOT regulations provide that manuals issued by the FHWA, such as those set forth above, are "generally designed for use in issuing permanent or long-lasting detailed policy and procedure." 23 C.F.R. § 1.32(b)(5).

On April 4, 1994, the Third Circuit Court of Appeals affirmed the district court order, without opinion, "essentially for the reasons given in the Memorandum dated December 9, 1992, and the Order filed June 23, 1993, by the district court . . . " App. at A-1 - A-2.

REASONS FOR ALLOWING THE PETITION

The question presented by this petition strikes at the very heart of the program established by Congress for mandatory DBE participation on all federally funded highway and transit programs. The decision below affects every construction project that involves federal funds and all DBEs, which under USDOT regulations, are entitled to the maximum opportunity to perform on federally-funded projects. The decision in this case contravenes the stated goals and specific provisions of the DBE program. If allowed to stand, it will effectively eviscerate the DBE

program by allowing contractors to use termination for convenience clauses as a pretext for discrimination and arbitrary and capricious actions against DBEs. As such, this petition presents an important question of federal law, which has not been, but should be decided by this Court.

The DBE program was passed by Congress to remedy discrimination faced by socially and economically disadvantaged persons in the highway and mass transit construction industry.[5] The heart of that program is its mandatory goals for DBE participation in every federally-funded highway project. The courts below gave rubber-stamp approval to the termination of a DBE solely at the unreviewable discretion of the prime contractor, even though the DBE was performing satisfactorily. There is no way to square those decisions with the stated purpose of the DBE program, which is to require contracting with DBEs on all FHWA jobs and to "encourage and increase [DBE] participation in contracts and programs that [USDOT] funds." 45 Fed. Reg. 31173 (Mar. 31, 1980). The decision permits the creation of precisely the type of barrier to DBE participation which the DBE program and its regulations were designed to eradicate. The fact that a contractor may still meet minimum levels of participation through substitutions more agreeable to the contractor will ensure only that those DBEs which front or are intimidated by a contractor's demands will remain on the project. Consequently, DBEs that do not succumb to a contractor's demands may be terminated with impunity after expending extensive start-up costs and before reaping the benefits of completion of their performance. This

---

[5] *See* Note 1, *supra*.

result is inimical to the DBE program, which was designed to rectify past discrimination by providing DBEs with the protection necessary to obtain and complete work on federally funded projects, so long as they satisfactorily perform. In addition, the use of a termination for convenience to accommodate the purely arbitrary desires of a prime contractor goes well beyond the limited purposes for which this concept was originally developed by the government for use on its contracts. *See Torncello v. United States*, 681 F.2d 756, 765 (Ct. Cl. 1982) (termination for convenience clause developed to address the risk of uncertain circumstances in wartime).

Further, the decisions create a gaping hole in the DBE regulations contrary to Congress' stated intent. The decisions below create an anamoly whereby 49 C.F.R. § 23.45(f)(2) would require a contractor to exercise good faith efforts to replace only those DBEs terminated for performance reasons but not those terminated for convenience. If this ruling is allowed to stand it will render the 10% DBE goal illusory.

The petition should also be granted because in doing so, this Court will have the opportunity, within the context of deciding the question presented, to review the latitude within which an administrative agency may interpret and apply its own regulations. In this case, the district court deferred to USDOT's interpretation of its DBE regulations which were provided in response to a review of T.I.'s case. These interpretations were in direct conflict with the DBE regulations, USDOT's prior agency-wide pronouncements and its DBE participant's manual (which by law has the effect of policy). These agency statements prohibit the termination of a DBE *unless* the

DBE is unable or unwilling to perform. A court should ordinarily defer to an agency's interpretation of the regulations it has promulgated with statutory authority. *Silvis v. Heckler*, 578 F. Supp. 1401, 1403 (W.D. Pa. 1984). However, "the weight of an administrative interpretation will depend, among other things, upon 'its consistency with earlier and later pronouncements' of an agency." *Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (Court refused to defer to position taken by Bureau of Indian Affairs which conflicted with position continuously expressed to Congress by Bureau); *see also Internorth, Inc. v. Department of Energy*, 548 F. Supp. 987, 995 (D.Del. 1982) (Court refused to defer to agency interpretation that was first issued at the end of a period during which there had been a pattern of contrary or ambiguous advice from an agency); *McCoog v. Hegstrom*, 690 F.2d 1280, 1284 (9th Cir. 1982). It is clear in this case that USDOT may not establish agency-wide interpretations of its regulations, but apply a different rule in this case. The district court therefore, was not entitled to selectively choose between USDOT's inconsistent interpretations. In doing so, the district court disregarded USDOT's agency-wide pronouncements on the interpretation of its regulations which would have precluded the termination of T.I. solely for Kiewit's convenience.

CONCLUSION

A writ of certiorari should issue to review the important national issues raised by the Orders and Opinion rendered by the courts below.

Respectfully submitted,

VICTOR P. STABILE
[Counsel of Record]
GERALD E. BURNS, III
DILWORTH, PAXSON, KALISH
& KAUFFMAN
305 N. Front Street, Suite 403
Harrisburg, PA 17101
(717) 236-4812

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1631

T.I. CONSTRUCTION CO, INC.,
Appellant

v.

KIEWIT EASTERN CO., PERINI CORPORATION, KIEWIT/PERINI, A JOINT VENTURE, HANK ADAMS, GLENN CHRISTENSON, DICK STERMER, MARK KEPPLER, RAYMOND ROTH,

Appellees

(Civil No. 91-2638 – E.D. of Pa.)
District Judge: Honorable Jan E. DuBois

Argued January 24, 1994

BEFORE: MANSMANN, NYGAARD and SEITZ, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by the parties and essentially for the reasons given in the Memorandum dated December 9, 1992, and the Order filed June 23, 1993, by the district court, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on June 23, 1993, be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ Seitz
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk,
P. Douglas Sisk, Clerk

DATED: Apr. 4, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

T.I. CONSTRUCTION CO., INC.	:	CIVIL ACTION
vs.	:	
	:	NO. 91-2638
KIEWIT EASTERN CO., PERINI CORPORATION, KIEWIT/PERINI, A JOINT VENTURE, et. al.	:	(Filed Dec. 10, 1992)

MEMORANDUM

DUBOIS, J. **DECEMBER 9, 1992**

This action arises out of a construction subcontract between T.I. Construction Co., Inc. ("T.I.") and Kiewit/Perini, A Joint Venture, for work on a federally assisted highway construction project in Pennsylvania. T.I.'s claims, set forth in its fifteen count Second Amended Complaint, are based on theories of breach of contract, fraud, unjust enrichment, and civil RICO.[1]

Presently before the Court is the Motion of defendants, Kiewit/Perini, A Joint Venture, Kiewit Eastern Company ("Kiewit"), and Perini Corporation ("Perini") (hereinafter collectively referred to as "Kiewit/Perini") for Partial Summary judgment on ten Counts of the Second Amended Complaint. Kiewit/Perini's Motion can be categorized as follows: (1) summary judgment on those counts seeking damages for anticipated lost profits from the allegedly improper termination of T.I.'s subcontract (Counts II, III and X); (2) summary judgment on those counts seeking damages and backcharges asserted before

---

[1] Count XV, the RICO count, was dismissed by Order dated August 5, 1992.

T.I. executed a Release of all claims on October 27, 1989 (Counts IV, V, VI, VII, VIII and XII); and (3) summary judgment on the count seeking quasi-contractual relief (Count XIII).

For the reasons stated below, the Court will grant Kiewit/Perini's Motion for Partial Summary Judgment. The remaining counts of the Second Amended Complaint, Counts I, IX, and XI, deal with the allegedly unpaid contract balance and backcharges arising after October 27, 1989 and amount to less than $100,000.[2] Accordingly, such counts will be referred to arbitration pursuant to Local Rule of Civil Procedure 8.

I. FACTUAL BACKGROUND

Plaintiff is a Disadvantaged Business Enterprise ("DBE").[3] Kiewit/Perini is a joint venture comprised of Kiewit and Perini. This action results from the alleged breach of a subcontract between T.I. and Kiewit/Perini for the performance of storm drainage work on a portion of I-476, commonly known as the Blue Route, a state highway in the Philadelphia, Pennsylvania area.

On June 14, 1988, the Pennsylvania Department of Transportation ("PennDOT") entered into a contract with

---

[2] The Court need not consider Count XIV, the request for attorney's fees, because the parties have agreed to address their mutual claims for attorney's fees at the conclusion of the case pursuant to the procedures for awarding of attorney's fees to prevailing parties set forth in 42 U.S.C § 1983, *et seq.*

[3] A Disadvantaged Business Enterprise, as defined in Title 49 of the Code of Federal Regulations, part 23, includes a woman-owned business enterprise.

Kiewit/Perini for the construction of Section 200 of the Blue Route. Pursuant to the contract, involving state administered federal highway funds, Kiewit/Perini was required to meet PennDOT's Disadvantaged Business Enterprises Utilization Affirmative Action requirements.[4] On July 1, 1988, T.I. and Kiewit/Perini executed a contract in which T.I. agreed to perform the storm drainage work for Section 200 for $2,530,611.70. This amount was later increased to $2,820,539.35.

The subcontract between T.I. and Kiewit/Perini incorporated by reference certain DBE regulations which provide that a DBE should be given the "maximum opportunity to perform" its contractual obligations.[5] Section 6(e) of the subcontract included a standard termination for convenience clause that permits the general contractor to terminate the subcontract without any formal breach and specifically disallows damages for loss of

---

[4] Kiewit/Perini was required to award 10% of the work to qualified DBEs pursuant to United States Department of Transportation ("USDOT") regulations set forth in 49 Code of Federal Regulations, part 23.

[5] The contract incorporates by reference PennDOT's Disadvantaged Business Enterprise Utilization Affirmative Action Requirements, paragraph B, C, and D. Paragraph C of the requirements provides that the prime contractor will:

> [t]ake all necessary and reasonable steps in accordance with 49 C.F.R. Part 23, as amended, to ensure that DBEs have the maximum opportunity to compete for and perform contracts. Do not discriminate on the basis of race, color, national origin or sex in the award and performance of . . . contracts.

profits.[6] Section 6(g) of the subcontract stated that if a court finds any termination of the subcontract to have been improper, "such termination will be deemed converted to a termination for convenience and the Subcontractor's remedies shall be limited to those set forth in Subsection 6(e)."

T.I. allegedly mobilized at the construction site to begin work at Kiewit/Perini's request on August 16, 1988. Thereafter, problems arose between T.I. and Kiewit/Perini.[7] During the course of the construction, T.I. and

---

[6] Section 6(e) of the parties contract provides that:

> The Subcontractor agrees that the Contractor may on five (5) days written notice to the Subcontractor, terminate this Subcontract in whole or in part for the Contractor's convenience. Subcontractor's remedy for termination for convenience is limited to the following: (1) Subcontractor shall be entitled to be paid pursuant to the prices set forth in Section 2 hereof for all work properly performed prior to termination, (2) items of work on the basis of the percent complete of such items at the time of termination, (3) The Subcontractor shall be reimbursed for reasonable closeout costs, and (4) Subcontractor shall not be entitled to any compensation for loss of anticipated profits or unallocated overhead.

[7] After T.I.'s initial mobilization, Kiewit/Perini provided T.I. with weekly schedules of storm drainage work which designated a specific site or sites and the expected dates of storm drainage installation. T.I. contends that it mobilized at the first designated construction site on August 22, 1988, only to discover that Kiewit/Perini had not completed the preliminary grading work which was necessary before T.I. could install the scheduled storm drainage. T.I. maintains that between August 16, 1988, and December 8, 1989, Kiewit/Perini scheduled storm drainage installation work at approximately 38 separate sites,

Kiewit/Perini made numerous backcharge and damage claims against each other.

By October 1989, relations between the parties had reached a point where they agreed to meet to discuss their various disputes. Such a meeting, attended by representatives of T.I. and Kiewit/Perini, and their attorneys, was held on October 27, 1989. T.I. was represented at the meeting by its president, A. Dixie Evans, and its attorney, William D. Moyers, as well as others. Kiewit/Perini was represented by, among others, its attorney Raymond Roth. At the meeting, which took place at the office of T.I.'s attorney, A. Dixie Evans signed a Release waiving and releasing any and all claims against Kiewit/Perini "arising from or through the performance of work or alleged extra work under the subcontract dated July 1, 1988, as to and up to the date of signing." Kiewit/Perini agreed to pay T.I. $15,001.33 and to issue joint checks with the subcontractor to several of its suppliers in the amount of $39,998.67.

On February 23, 1990, Kiewit/Perini notified T.I. that it was terminating its subcontract effective March 3, 1990, pursuant to section 6 of that document. Kiewit/Perini notified PennDOT of the termination and submitted a

---

but that only 14 of these sites were properly prepared by Kiewit/Perini for immediate storm drain installation on the scheduled dates. As a result of Kiewit/Perini's failure to properly prepare sites, T.I. claims it mobilized ten times, even though the original "flow chart" for Section 200 provided for a total of four mobilizations for all of the storm drainage work. T.I. further claims that during the periods of demobilization Kiewit/Perini repeatedly scheduled and then postponed the date of remobilization.

revised DBE schedule to PennDOT.[8] For the purposes of the summary judgment motion, T.I. and Kiewit/Perini are

---

[8] At T.I.'s request, the PennDOT Good Faith Efforts Review Committee held a meeting on March 19, 1990 to review T.I.'s termination. PennDOT approved Kiewit/Perini's substitution of another DBE subcontractor to replace T.I. on March 28, 1990.

On April 27, 1990, T.I. appealed to the Commonwealth Court of Pennsylvania, and asked the court to reverse Penn DOT's approval of the revised DBE schedule and order T.I.'s reinstatement as the storm drainage subcontractor. The Court granted PennDOT's motion to quash the appeal. On June 26, 1990, T.I. requested that the United States Department of Transportation ("USDOT") review and investigate its termination. USDOT directed the Federal Highway Administration ("FHWA") to investigate, and the FHWA, by letter dated December 27, 1990, informed counsel for T.I. that USDOT had concluded that neither USDOT nor FHWA had jurisdiction over the dispute, and that the controversy was a private dispute between a prime contractor and a subcontractor, not a case of discrimination on the basis of gender. T.I. requested reconsideration of the FHWA decision, and by letter dated February 14, 1991 the Administrator of FHWA, T.D. Larson, responded to T.I.'s request and concluded that "termination of [T.I.'s] contract was handled properly and in compliance with Federal requirements governing the DBE program."

On April 15, 1991, T.I. brought suit against USDOT in this Court, T.I. Construction Co., Inc. v. Skinner, No. 91-2433, seeking an order in the nature of mandamus compelling USDOT to require PennDOT to rescind its March 27, 1990 decision approving Kiewit/Perini's termination of T.I. On October 11, 1991, the case was voluntarily dismissed without prejudice to the right of T.I. to proceed against Kiewit/Perini.

T.I. argued to this Court in its Memorandum of Law in Support of Plaintiff's Answer to Defendants' Motion for Partial Summary Judgement that it was not afforded adequate due process at the PennDOT Good Faith Review Committee hearing. Significantly, T.I. did not assert that claim in its Second Amended Complaint, so it is not properly before the Court. In

both presuming that the termination was pursuant to subsection 6(e) of the T.I. – Kiewit/Perini subcontract.

II. STANDARD OF REVIEW

Summary judgment is appropriate where the moving party demonstrates an absence of any evidence to support the non-moving party's case, the non-moving party fails to come forward with such facts that a trier of fact could find in its favor, and the moving party is entitled to judgment as a mater of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514-15 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53 (1986). The "court does not resolve questions of disputed facts, but simply decides whether there is a genuine issue of fact which must be resolved at trial. The facts must be viewed in the light most favorable to the non-moving party, and reasonable doubt as to the existence of a genuine issue of material fact is to be resolved against the moving party." *Tyro Indus. Inc. v. Trevose Constr. Co.*, 737 F. Supp. 856, 861 (E.D. Pa. 1990) (citations omitted) (termination of construction sub-subcontract involving DBE requirements).

Nonetheless, a party opposing a motion for summary judgment must designate specific facts showing that there is a genuine issue for trial because summary judgment is designed to go beyond the pleadings to assess

---

any event, the Court need not address this issue because even if T.I. did not receive adequate due process at the PennDOT hearing, this would not affect the Court's disposition of Kiewit/Perini's Motion for Partial Summary Judgment.

whether a genuine issue of material fact exists. *Celotex*, 477 U.S. at 323-24, 106 S. Ct. at 2552-53. In order to defeat a properly supported motion for summary judgment, the plaintiff can not merely restate the allegations of his complaint, nor rely on self-serving conclusions unsupported by specific facts in the record, but must point to evidence in the record which supports each essential element of his case. *Id.*; *Childers v. Joseph*, 842 F.2d 689, 694-95 (3d Cir. 1988).

III. DISCUSSION

Kiewit/Perini has moved for summary judgment on the counts seeking damages for anticipated lost profits (Counts II, III, and X) on the ground that the T.I. subcontract was lawfully terminated pursuant to its terms and federal law and because the subcontract specifically excludes damages for lost profits. T.I. alleges that termination of the subcontract came about as a result of fraud committed by Kiewit/Perini, that the termination for convenience clause in the subcontract is invalid, unenforceable and inconsistent with federal law and policy, and that T.I. is entitled to damages for lost profits.

Kiewit/Perini has also moved for summary judgment on those counts seeking damages and backcharges asserted before T.I. executed a Release on October 27, 1989 (Counts, IV, V, VI, VII, VIII and XII) on the ground that T.I. executed a valid and enforceable release. T.I. argues that the Release is invalid and unenforceable because Kiewit/Perini fraudulently induced T.I. to sign the Release or otherwise misrepresented its intentions.

Finally, Kiewit/Perini has moved for summary judgment on the count seeking quasi-contractual relief (Count XIII) on the ground that T.I.'s claim for damages based on a theory of unjust enrichment must fail because there is an express contract between the parties. T.I. counters with the argument that it can claim unjust enrichment damages because the subcontract was terminated illegally.

A. T.I.'S EVIDENCE OF FRAUD AND DECEIT

To the extent that T.I. relies on fraud as a basis for opposing the Motion for Partial Summary Judgment, T.I. must point to evidence in the record that creates a genuine issue of material fact as to whether Kiewit/Perini engaged in fraudulent and deceitful conduct. The evidence must support each essential element of the fraud defense and must be "evidence which could lead a jury to find clear and convincing proof of fraud." *Moffatt Enterprises, Inc. v. Borden Inc.*, 807 F.2d 1169, 1175 (3d Cir. 1986); *see also Beardshall v. Minuteman Press Int'l. Inc.*, 664 F.2d 23, 26 (3d Cir. 1981); *Mellon Bank Corp. v. First Union Real Estate Equity and Mortgage Inv.*, 750 F. Supp. 711, 717 (W.D. Pa. 1990), *aff'd*, 951 F.2d 1399 (3rd Cir. 1991); *M. Leff Radio Parts, Inc. v. Mattel, Inc.*, 706 F. Supp. 387 (W.D. Pa. 1988).

The elements of fraud, according to Pennsylvania law, are "(1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as a proximate result."

Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 464 A.2d 1243, 1252 (1983) (quoting *Scaife Co., v. Rockwell-Standard Corp.*, 446 Pa. 280, 285, 285 A.2d 451, 454, *cert. denied*, 407 U.S. 920, 92 S. Ct. 2459, 32 L.Ed.2d 806 (1971)). Each element, moreover, must be proved by "evidence that is clear, precise, and convincing." *Snell v. Commonwealth, State Examining Bd.*, 490 Pa. 277, 281, 416 A.2d 468, 470 (1980); *see also Delahanty*, 464 A.2d at 1252; *Step-Saver Data Systems, Inc. v. Wyse Technology*, 752 F. Supp. 181, 189 (E.D. Pa. 1990), *aff'd in part, rev'd in part on other grounds*, 939 F.2d 91 (3rd Cir. 1991).

Pennsylvania case law has established that misrepresentations of past or existing facts may provide a basis for a claim of fraud. *Moffatt Enterprises*, 807 F.2d at 1174; *Germantown Mfg. Co. v. Rawlinson*, 341 Pa. Super. 42, 47-48, 491 A.2d 138, 141-42 (1985). By contrast, a "broken promise to do or refrain from doing something in the future is not fraud." *Mellon Bank*, 750 F. Supp. at 717; *See also M. Leff Radio Parts*, 706 F. Supp. at 397-98; *Oxford Indus., Inc. v. Luminco, Inc.*, 1991 WL 87928 (E.D. Pa. May 22, 1991); *Krause v. Great Lakes Holdings, Inc.*, 387 Pa. Super. 56, 563 A.2d 1182 (1989). It is clear, however that " 'a statement of present intention which is false when uttered may constitute a fraudulent misrepresentation of fact'." *Mellon Bank*, 750 F. Supp. at 717 (quoting *DuSesoi v. United Refining Co.*, 540 F. Supp. 1260, 1273 (W.D. Pa. 1982). A party cannot prove a misrepresentation of present intention at the beginning of a transaction by relying on what occurred after the transaction; rather, there must be evidence to demonstrate that there was a misrepresentation at the beginning of the transaction. *Id.*

Only three of T.I.'s exhibits in opposition to Kiewit/Perini's Motion for Partial Summary Judgment even remotely relate to evidence of fraud and deceit – excerpts from the depositions of A. Dixie Evans, President of T.I., and her attorney, William D. Moyer, and two complaints filed in federal court in the state of Washington. These deposition excerpts primarily deal with the settlement negotiations of October 27, 1989. Evans and Moyer assert that Evans was "tricked" into signing the October 27, 1989 Release. Neither of the depositions contain evidence that Kiewit/Perini fraudulently induced T.I. to execute the October 27, 1989 Release, misrepresented its intentions at the October 27 meeting, or otherwise engaged in fraudulent or deceitful conduct.[9] To the contrary, the

---

[9] When asked the basis for the claim that she was defrauded at the October 27 meeting, Evans testified as follows:

Q: Do you claim that you were tricked or defrauded into signing this release?

A: Definitely.

Q: On what basis?

A: No. 1, all the release was not paid out. Attorney Moyer had to argue with the amount of the release money. No. 2, Kiewit didn't have the sites repaired that caused me down time. No. 3, Kiewit didn't pay for the down time as they agreed to. No. 4, Kiewit didn't pay the weekly invoices as they agreed to. They deducted the back charges and down time. One invoice for $5,600 they actually paid me $85.60.

Q: These were all things that happened after October 27th?

A: That is correct. The subsequent actions to my signing the release, they had no intention of ever honoring their verbiage, you know, based upon what I signed here. I signed based upon their

deposition testimony shows that T.I. bases its fraud defense on the alleged failure of Kiewit/Perini to live up to promises made at the October 27 meeting and the termination of the subcontract. Such evidence might give rise to a breach of contract claim, but it is not evidence of fraud and does not raise a genuine issue of material fact as to the fraud defense.

The two complaints offered by T.I. in support of its fraud claim were filed by DBE subcontractors who had dealings with different Kiewit companies which are not

---

verbiage. They had no intention of doing what they promised to do.

Q: You base that in the subsequent acts?

A: Yes, I do. Especially when the termination took place.

Q: That was on February 23rd, 1990?

A: Correct.

Q: That's your basis for claiming that this release is invalid?

A: That is correct.

Q: When did you first conclude that you had been tricked into signing this release?

A: When I was terminated. Because prior to that, every one of the events that happened in itself was not of that magnitude of significance that I would have said total fraud. But when I put them all together, and especially when I was terminated. Because prior to that, every one of the events that happened in itself was not of that magnitude of significance that I would have said total fraud. But when I put them all together, and especially with the termination, it did weave its own picture. . . .

Moyer also asserted that he believed Evans had been misled by Kiewit/Perini into signing the Release, and based his claim of fraud on events subsequent to the October 27, 1989 meeting.

defendants in this case.[10] These cases were dismissed, one for lack of standing. In any event, the use of these complaints is insufficient to create a genuine issue of material fact. Complaints, and the charges and allegations they contain, are hearsay under the Federal Rules of Evidence. *Century "21" Shows v. Owens*, 400 F.2d 603, 609-10 (8th Cir. 1968). Opposition to summary judgment must be supported by admissible evidence. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1118 n.3 (E.D. Pa. 1981) (summary judgment motion must be decided upon evidence that would be admissible or usable at trial); *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990) (party cannot rely on hearsay evidence to oppose summary judgment). The two complaints, moreover, are irrelevant because they do not even concern the conduct of the Kiewit/Perini defendants in this case, and T.I. has failed to provide any evidence of a link between those defendants and the Kiewit/Perini defendants in this case.

T.I. also asserted in its Memorandum of Law in Support of its Answer to Defendants' Motion for Partial Summary Judgment that the DBE Kiewit/Perini substituted for T.I., Graco Trucking, was a "front" and that Kiewit/Perini's relationship with Graco is the subject of some unspecified investigation by the "Department of Labor." T.I. did not provide *any* evidence in support of this allegation. Accordingly, T.I.'s assertion that Graco

---

[10] In addition, in its Memorandum of Law in Support of its Answer to Defendants' Motion for Partial Summary Judgment, T.I. referred to a case in Boston allegedly commenced by SAC's Construction Company against Kiewit, and states that it will furnish this Court with a copy of the pleadings in that case. Plaintiff never produced the pleadings.

Trucking was a front for Kiewit/Perini is insufficient to raise a genuine issue of material fact.

T.I. additionally argued in its Memorandum of Law in Support of its Answer to Defendants' Motion for Partial Summary Judgment that it has not had sufficient opportunity to present evidence supporting its allegation of fraud because of a Court Order preventing it from conducting discovery, and because it had not yet questioned Evans about Kiewit/Perini's allegedly fraudulent and deceitful conduct. This argument is without merit.

T.I. presumably was referring to the Court's September 19, 1991 Order that set a briefing schedule for the Motion to Dismiss Count XV (the RICO count) and a discovery deadline of March 31, 1992. The Order did not stay discovery or otherwise prevent either party from pursuing discovery on any issue.[11]

If T.I.'s counsel needed additional time to question his own client, he should have made a request under Federal Rule of Civil Procedure 56(f) for a continuance of the motion. In *Dowling v. Philadelphia*, 855 F.2d 136, 140 (3rd Cir. 1988), the Third Circuit made it clear that the

---

[11] In Kiewit/Perini's Reply Memorandum in Support of their Motion for Partial Summary Judgment, counsel for Kiewit/Perini stated that during this conference counsel for Kiewit/Perini noted that since T.I. had referred to other cases involving other Kiewit Companies, it might be necessary to depose the plaintiffs in those jurisdictions. According to Kiewit/Perini's counsel, the Court instructed Kiewit/Perini's counsel to hold off on such discovery until the Motion to Dismiss the RICO Count was decided. By Order dated August 5, 1992, the Court granted the Motion to Dismiss the RICO Count, Count XV.

filing of an affidavit is necessary to preserve the contention that summary judgment should be delayed pending further discovery. The Third Circuit held that Rule 56(f) requires that the affidavit present "what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it was not previously obtained." *Id.* The *Dowling* case is particularly instructive, because in *Dowling*, as here, the plaintiff failed to file an affidavit regarding her personal knowledge of the issues on which she sought additional discovery.

Notwithstanding T.I.'s failure to proceed in accordance with Federal Rule of Civil Procedure 56(f), the Court held a status conference on September 23, 1992 in order to determine whether any additional discovery was needed by T.I. or Kiewit/Perini in connection with the Motion for Partial Summary Judgment. At that conference, T.I. and Kiewit/Perini stated that no additional discovery was needed.

In sum, the evidence T.I. has offered in opposition to Kiewit/Perini's Motion for Partial Summary Judgment – the deposition testimony and the two complaints filed in federal court in Washington – does not support the elements of its fraud claims. Indeed, T.I. essentially relies on the allegations of fraud and deceit in its Complaint, including the RICO allegations which have been dismissed by this Court. That is insufficient to defeat a motion for summary judgment.

B. PLAINTIFF'S CLAIM FOR LOST PROFITS ON THE BASIS OF UNLAWFUL TERMINATION (COUNTS II, III, X)

Counts II, III and X of T.I.'s Second Amended Complaint cover claims for lost profits resulting from the termination of the subcontract between T.I. and Kiewit/Perini. Count II alleges "breach of contract pursuant to federal regulations." Count III alleges "breach of contract – violation of public policy." Count X alleges fraud and deceit. Kiewit/Perini has moved for summary judgment on these counts on the ground that the T.I. subcontract was lawfully terminated pursuant to its terms and federal law and because the express terms of the subcontract bar recovery of damages for lost profits. T.I. counters that termination of the subcontract was unlawful because it came about as a result of the fraud committed by Kiewit/Perini, and because the termination for . . .

Having concluded that T.I. has not come forward with any evidence that Kiewit/Perini engaged in fraudulent or deceitful conduct, the Court must now determine whether, as a matter of law, the subcontract with T.I., a DBE, can be terminated for convenience.

1. Termination for Convenience Clause in DBE Contract

As a preliminary matter, the Court notes that the United States Department of Transportation ("USDOT"), the agency charged with interpreting and enforcing the DBE regulations, rejected T.I.'s claim that the subcontract could not be terminated for convenience pursuant to the termination for convenience clause in the T.I. – Kiewit/

Perini subcontract because that clause is inconsistent with the DBE regulations. In two letter rulings in the T.I. case, letters dated December 27, 1990 and February 14, 1991, from T.D. Larson, the Administrator of the USDOT Federal Highway Administration, to Representative Bill Goodling, USDOT determined that the termination of T.I. complied with the federal requirements governing the DBE program.

In the letter dated December 27, 1990, USDOT stated "that the termination [of the T.I. subcontract] was handled properly and that we can find no evidence of discrimination against T.I." USDOT further stated that "this matter is a dispute between a prime contractor and a subcontractor, not a civil rights matter" and concluded that

> [d]isputes of this type are not unusual. When they occur, the prime contractor may find they interfere with the orderly conduct of business . . . Therefore, the contractor may terminate a subcontractor "for convenience". . . .

In the letter of February 14, 1991, USDOT reasserted that the termination for convenience was not inconsistent with the DBE regulations. USDOT concluded that the DBE regulations are not intended to override contract obligations and, absent a civil rights issue, do not prohibit termination for convenience. USDOT stated

> Federal law governing the DBE program for Federal-aid highway projects . . . does not address the subject of termination.
>
> The DOT's regulations on the DBE program . . . do not establish the reasons why a DBE subcontractor may be terminated . . .

> In accordance with normal industry practice, prime contractors and subcontractors enter into contractual arrangements. Neither the [Federal Highway Administration] nor the State highway agency is a party to the contracts. However, the contracts must either make reference to or incorporate the required Federal-aid contract provisions, including those applying to DBE's [sic]. The clauses contained therein are legally binding on the signing parties, namely the prime contractor and the subcontractor. Under section 6(e) of the contract between Kiewit/Perini and T.I. Construction on the blue route, the prime contractor can terminate the contract "for convenience." Ms. Evans signed the contract with this provision, which does not conflict with DBE regulations.

The USDOT reaffirmed this position in its Memorandum of Law in Support of its Motion to Dismiss T.I.'s claims against it.[12] In that Memorandum, USDOT further explained the rationale for its position:

> [p]rime contractors, on government funded contracts, are required to include a "termination for convenience" clause in their contractors [sic] with recipients [e.g., PennDOT]. Such clause allows the recipient to terminate the contract for many reasons including lack of funding for the project, or a decision that the project is no longer needed. As a matter of prudence, the contractor must include such a clause in his subcontracts. Otherwise, if the recipient were to exercise the termination for convenience clause against the prime contractor, the contractor

---

[12] *See* Note 8, *supra*.

> might be obligated on a multi-million dollar contract. Furthermore, if the state government recipient were to exercise the termination for convenience clause at an early stage of contract performance, the contractor might be faced with subcontractor claims that far exceeded funding received from the government. Thus contractors might well be deterred from fulfilling their DBE requirements to avoid risk of financial ruin. Such a result was surely not envisioned by either Congress or the Department given the overriding purpose of the DBE regulations was to encourage the use of DBE's [sic]. Consequently, because Congress had not shown a clear intention to limit contractors in this way, DBE regulations should not be interpreted to limit a contractor's legal rights under an enforceable contract.

USDOT's determination that, absent a civil rights issue, a DBE contract can be terminated for convenience is entitled to deference by this Court. The DBE statute and regulations are silent with respect to the issue of termination. Where "a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782 (1984). Moreover, "considerable weight should be accorded to an executive department's construction of the statutory scheme it is entrusted to administer." *Id.; see also Disabled in Action v. Sykes*, 833 F.2d 1113, 1117 (3d Cir. 1987), *cert denied, sub nom. Philadelphia v. Disabled in Action*, 485 U.S. 989 (1988) ("in construing administrative

regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation").

T.I.'s reliance on language in a DBE Participant's Manual, published by USDOT as a teaching aid in the DBE Program Administration Training Course, in support of its assertion that a DBE contract may not be terminated for convenience, that the USDOT's December 27, 1990 and February 14, 1991 letter rulings are incorrect and contrary to previous USDOT interpretations of the DBE regulations, and that the USDOT's letter rulings in T.I.'s case are not entitled to deference, is misplaced. In the first place, the relevant language in the DBE Manual states that original DBE's may be substituted only if they are "unwilling or unable to perform." The Manual does not address whether or not it is permissible to terminate a DBE for convenience.

Moreover, as T.I. itself concedes, manuals and handbooks do not have the binding force of law. In *Rousseau v. Philadelphia*, 589 F. Supp. 961, 971 (E.D. Pa. 1984), the court held that a Housing and Urban Development Handbook did not confer contractual obligations on parties because "the mere issuance of the Handbook by HUD does not necessarily raise its provisions to the level of a federal rule or regulation . . . Handbooks that have not been published in accordance with the APA generally are considered to be nonbinding instructions or internal operating procedures." Furthermore, the Foreward to the DBE Participant's Manual states

> [t]he Manual is the primary teaching aid for the DBE Program Administration course . . . Let me emphasize that the material in this manual does not impose new or additional requirements upon the field offices or states beyond what is already required by federal laws and regulations.

Similarly, the Introduction states that the "material in this manual does not impose new or additional requirements in the DBE program . . . The only mandatory material in the manual is that which is currently mandated by law or regulation."

T.I.'s reliance on two USDOT memoranda issued in non-specific contexts, which are dated on June 5, 1984 and July 26, 1989 respectively, in support of its assertion that a DBE may not be terminated for convenience, is similarly misplaced. As a preliminary matter, these memoranda are entitled to less weight than the letter rulings issued by the USDOT's Federal Highway Administrator because they were not issued by the Administrator of the USDOT Federal Highway Program. *See Martin v. OSHRC*, 111 S. Ct. 1171, 1176 (1991) (Secretary of Labor's interpretations of OSHA regulations entitled to deference, rather than interpretation of Occupational Safety & Health Review Commission, because Secretary promulgated the regulatory standards.) In addition, these rulings do not constitute USDOT's official policy as applied to T.I.

Nothing in either or these memoranda, moreover, is inconsistent with the rulings issued by USDOT in the T.I.

case. The June 5, 1984 memorandum of a deputy administrator to regional administrators states that when a contractor wishes to alter its arrangement with a DBE it should present as a ground for state approval either default, overextension, or other justification. The memorandum does not state that a material breach is required or that a termination for convenience clause is invalid. The July 26, 1989 memorandum of a regional manager in Texas, which appears to be an incomplete document, states that there must be sufficient reason to terminate a DBE contract but nowhere states that a contract with a DBE cannot be terminated for convenience.

USDOT's determination that a contract with a DBE can be terminated for convenience on the same basis as a contract with a non-DBE is, moreover, supported by case law. An analogous issue was raised in *Tyro Industries*, 737 F. Supp. 856, where a DBE sub-subcontractor challenged the termination of its contract for failing to maintain liability insurance because the subcontractor had not allowed it a reasonable opportunity to cure the default. Under the contract, Tyro, the DBE, was required to provide and maintain liability insurance. As here, the contract incorporated by reference PennDOT's requirements that a contractor "take all necessary and reasonable steps . . . to ensure that DBE's have the maximum opportunity to compete for and perform contracts." *Id.* The contract also contained a provision requiring the subcontractor to grant the sub-subcontractor five days written notice to cure any default related to the character or time of performance. *Id.*

Tyro argued that the DBE regulations implied an obligation to provide a DBE with a reasonable opportunity to cure any default, including its failure to provide and maintain liability insurance. In that case, the court granted summary judgment, concluding that the five day written notice and cure requirement did not apply to the failure to maintain liability insurance, and rejecting Tyro's claim that its contract could not be terminated on the same basis as that of a non-DBE. The court also gave deference to the determination of the PennDOT DBE Good Faith Review Committee in that case which concluded that the termination was not in violation of DBE regulations. *Id.* While *Tyro Industries* did not involve a termination for convenience clause, the principle it espouses – that a contract with a DBE may be terminated on the same basis as a contract with a non-DBE – applies equally to the case at issue.

2. Termination for Convenience Clauses in Contracts – Generally

T.I. additionally argues in its Supplemental Memorandum of Law in Answer to Defendants' Motion for Partial Summary Judgment that, irrespective of its status as a DBE, termination for convenience clauses are contractually unenforceable, or, at a minimum, can only be invoked in the event of some kind of changed circumstances in the bargain. In support of this position, T.I. cites *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982), a federal government contract case where the Department of Navy entered into an exclusive requirements contract knowing that it could get the same services much cheaper from another supplier. When the contractor sued the

Navy for breach of its agreement to buy all pest control services from the contractor the Navy defended its admitted breach on the ground that the termination for convenience clause entitled it to "constructively" terminate the contract for convenience and thereby retroactively justify any failure to purchase pest control services. *Id.* at 760. The court rejected this argument and held that in such circumstances the government would not be permitted to retroactively justify its breach on the ground that it could have terminated the contract for convenience in any event. *Id.* at 771-72. The court held that to allow the government to interpret the termination for convenience clause so broadly in the case of a requirements contract would render the contract illusory and void for lack of consideration because the government would effectively not be bound by the contract. *Id.* Significantly, the opinion states that it is limited to the facts presented, and "that termination for convenience clauses are a valuable and important aspect of federal procurement." *Id.* at 772.

Subsequent federal cases have similarly stated that *Torncello* merely "stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause." *Salsbury Indus. v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 671 (1991). In *Salsbury*, the court held that a termination for convenience clause is valid where parties enter into a definite quantity contract with the intention of honoring the contract. *See also EDO Corp. v. Beech Aircraft Corp.*, 911 F.2d 1447 (10th Cir. 1990) (granting summary judgment in a case involving termination for convenience

under a private contract where the court found that the parties to the contract had "mutual obligations" under the contract, notice of intent to terminate was given, close-out damages for termination were provided, and the termination was not in bad faith.) Thus, contrary to the plaintiff's assertion, *Torncello* does not stand for the broad proposition that termination for convenience clauses are generally disfavored.

The T.I. – Kiewit/Perini subcontract, including the termination for convenience clause, is similar to the contracts at issue in *Salsbury* and *EDO*. Both parties had mutual obligations under the subcontract, and both parties proceeded under the terms of the subcontract from August 1988 until February 1990. Kiewit/Perini was also required under the terms of the subcontract to provide plaintiff with notice of termination, to reimburse plaintiff for "reasonable close-out costs," and to pay for work partially or fully completed. Thus, the T.I. – Kiewit/Perini subcontract, unlike the contract at issue in *Torncello*, can in no way be considered illusory.

Even if *Torncello* were applicable to this case, Kiewit/Perini could still have terminated the T.I. subcontract for convenience. When *Torncello* concerns are raised, the government may still invoke the termination for convenience clause when "the circumstances of the bargain or the expectations of the parties have changed." *Embrey v. United States*, 17 Cl. Ct. 617, 6245 [sic] (1989). In *Embrey*, the court found that the deterioration in the business relationship between the parties constituted a change in the circumstances and expectations of the parties sufficient to justify a termination for convenience. *Id.* It is

undisputed in this case that T.I. and Kiewit had experienced a deterioration in their business relationship.

3. Conclusion

In sum, the termination of the subcontract with T.I., a DBE, pursuant to the termination for convenience clause in the T.I. – Kiewit/Perini subcontract was lawful. Termination for convenience clauses are contractually enforceable.[13] The termination of a DBE contract pursuant to a termination for convenience clause is consistent with federal law and policy. The subcontract with T.I. specifically excludes damages for lost profits in the event of termination for convenience. Because termination of the T.I. subcontract was lawful, T.I. can not recover damages for lost profits. Accordingly, summary judgment will be granted on Counts II, III and X.

---

[13] There is authority for T.I.'s position that termination pursuant to the termination for convenience clause in the subcontract would be unlawful *if* it came about as a result of Kiewit/Perini's fraudulent conduct. In *EDO Corp.*, 911 F.2d 1447, the court noted, "[w]e concur in the district court's determination that Beech's exercise of its right to terminate must have been in good faith . . . Moreover, we agree with the trial court that Beech's cancellation of the contract was done in good faith." *Id.* at 1453, n. 6.

The Court, however, need not address this issue because the Court has concluded that T.I. has not come forward with any evidence in support of its fraud claim.

C. PLAINTIFF'S CLAIMS FOR DAMAGES AND BACKCHARGES PRIOR TO THE OCTOBER 27, 1989 RELEASE (COUNTS IV, V, VI, VII, VIII, XII)

Counts IV, V, VI, VII, VIII and XII of T.I.'s Second Amended Complaint relate to damages and backcharges asserted before T.I. executed a Release on October 27, 1989. Count IV covers claims for adverse site conditions allegedly created by Kiewit/Perini that inhibited T.I.'s ability to perform. Count V seeks damages for manipulation of such adverse site conditions by Kiewit/Perini to its own advantage. Count VI alleges that Kiewit/Perini hired individuals to "disrupt, destroy and cause T.I. to feel threatened in its daily operations" and that subsequent to an April 15, 1989 meeting between T.I. and Kiewit/Perini, during which T.I. refused to relinquish its contract rights, there were three separate incidents of vandalism to T.I.'s construction equipment, for all of which damages are sought. In Count VII, T.I. claims damages for the failure of Kiewit/Perini to supply two drill rigs to assist in fracturing rock at five scheduled sites. Count VIII seeks damages and backcharges for claims asserted before October 27, 1989, on the ground that Kiewit/Perini never intended to honor the agreement it made with T.I. in exchange for the October 27, 1989 Release. Finally, in Count XII, T.I. claims that Kiewit/Perini continued to fail to properly prepare work sites after October 27, 1989, and from December 8, 1989, through February 12, 1990, repeatedly delayed remobilization dates after leading T.I. to believe that work would recommence, all to T.I.'s damage.

Kiewit/Perini has moved for summary judgment on all such Counts on the ground that T.I. executed a valid

and enforceable Release of these claims on October 27, 1989, and that Kiewit/Perini did not fraudulently induce T.I. to execute the Release or otherwise engage in fraudulent and deceitful conduct.[14] T.I. counters that the Release is invalid and unenforceable on the basis of Kiewit/Perini's allegedly fraudulent and deceitful conduct throughout the entire period of the relationship between T.I. and Kiewit/Perini, and not on the ground that Kiewit/Perini failed to live up to promises made at the October 27, 1989 meeting.

If T.I. had come forward with evidence to show that Kiewit/Perini fraudulently induced T.I. into executing the October 27, 1989, Release, or otherwise misrepresented its intentions, T.I. could defeat Kiewit/Perini's Motion for Partial Summary Judgment. T.I., however, has not pointed to *any* evidence in the record to support the allegation that Kiewit/Perini misrepresented its intentions during the October 27, 1989, settlement negotiations, or in any way fraudulently induced T.I. to execute the Release. In fact, T.I.'s evidence offered in opposition to Kiewit/Perini's Motion, most notably Evans' deposition excerpts, actually negate T.I.'s contention that its fraud claim is *not* based on the ground that Kiewit/Perini

---

[14] In addition, Kiewit/Perini maintains that even if T.I. entered into the Release as a result of fraud by not returning the funds it received pursuant to the October 27, 1989 Release, T.I. has reaffirmed the parties' settlement and cannot now seek to invalidate it. T.I. did not respond to this argument, except to say that it could not afford to return the money, but would attempt to do so if the Court orders it to do so. The Court, however, need not address this issue, because, as discussed above, the Release is valid and enforceable.

failed to live up to promises made at the October 27, 1989 meeting.[15]

The Court therefore concludes that T.I. has failed to come forward with evidence to show that there is a genuine issue of material fact as to whether Kiewit/Perini misrepresented its intentions in connection with the execution of the October 27, 1989 Release, or in any way fraudulently induced T.I. to sign the Release. Absent such a showing, the Release is valid and enforceable. Accordingly, summary judgment will be granted as to Counts IV, V, VI, VII, VIII and XII.

D. T.I. IS LIMITED TO DAMAGES AVAILABLE UNDER THE CONTRACT AND CANNOT CLAIM UNJUST ENRICHMENT (COUNT XIII)

Count XIII of T.I.'s Second Amended Complaint is for unjust enrichment. Kiewit/Perini argues that T.I.'s claim for damages based on a quasi-contractual theory of unjust enrichment must fail because there is an express contract between the parties. T.I. counters with the argument that its claim for unjust enrichment is not based upon express contract, but rather upon the theory that the contract was terminated illegally.

T.I.'s claim for damages based on unjust enrichment fails as a matter of law because "the doctrine of unjust enrichment [is] inapplicable when the relationship between the parties is founded on a written agreement or express contract." *Schott v. Westinghouse Elec. Corp.*, 436 Pa 279, 290, 259 A.2d 443, 448 (1969). Damages based on

---

[15] *See* Note 9, *supra*.

unjust enrichment will not be awarded where there is an express agreement between the parties. *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987). Moreover, as set forth subsection B above, termination of the T.I. subcontract pursuant to the termination for convenience clause was lawful. Therefore, summary judgment will be granted as to Count XIII.

E. T.I.'s Remaining Counts

The remaining Counts of T.I.'s Second Amended Complaint, Counts I, IX and XI, deal with the alleged unpaid contract balance and backcharges arising after October 27, 1989, and amount to less than $100,000. Accordingly, under Local Rule of Civil Procedure 8, such Counts of T.I.'s Complaint will be referred to arbitration.

IV. CONCLUSION

Summary judgment will be granted in favor of defendant, Kiewit/Perini, on Counts II, III, IV, V, VI, VII, VIII, X, XI and XII of the Second Amended Complaint. T.I. has failed to come forward with evidence demonstrating that there is a genuine issue of material fact as to those counts. Kiewit/Perini's termination of its subcontract with T.I. pursuant to the termination for convenience clause was lawful. The October 27, 1989 Release between T.I. and Kiewit/Perini is a valid and enforceable contract. T.I. is limited to damages under the subcontract and can not claim unjust enrichment damages. Counts I, IX and XI of

the Second Amended Complaint will be referred to arbitration under Local Rule of Civil Procedure 8.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

T.I. CONSTRUCTION CO., INC.	:	CIVIL ACTION
vs.	:	
	:	NO. 91-2638
KIEWIT EASTERN CO.,	:	
PERINI CORPORATION, KIEWIT/	:	(Filed
PERINI, A JOINT VENTURE	:	Dec. 10, 1992)

ORDER

AND NOW, to wit, this 9th day of December, 1992, upon consideration of the Motion of Defendants, Kiewit Eastern Company, Perini Corporation and Kiewit/Perini, A Joint Venture, for Partial Summary Judgment on Counts II, III, IV, V, VI, VII, VIII, X, XII and XIII (Doc. No. 37), the Answer of Plaintiff, T.I. Construction Company (Doc. No. 42) and the Memorandum of Law in Support of Plaintiff's Answer (Doc. No. 43), the Defendants' Reply Memorandum in Support of its Motion for Partial Summary Judgment (Doc. No. 45), Plaintiff's Supplemental Memorandum of Law in Answer to Defendants' Motion (Doc. No. 46), the Defendants' Response to Plaintiff's Supplemental Memorandum (Doc. No. 49), and after a status conference held in chambers on September 23rd, 1992, IT IS HEREBY ORDERED that the Motion of Defendants For Partial Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that Counts I, IX and XI of Plaintiff's Second Amended Complaint are REFERRED TO ARBITRATION pursuant to Local Rule of Civil Procedure 8 for assignment to a panel of arbitrators for trial

on January 11, 1993 or as soon thereafter as the trial can be scheduled.

BY THE CLERK

/s/ Jan E. Dubois
JAN E. DUBOIS, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

T.I. CONSTRUCTION CO., INC.	:	CIVIL ACTION
vs.	:	NO. 91-2638
KIEWIT EASTERN CO., PERINI CORPORATION, KIEWIT/ PERINI, A JOINT VENTURE	:	(Filed Jun. 22, 1993)

ORDER

AND NOW, to wit, this 21st day of June, 1993, upon consideration of the Stipulation of the parties dated June 16, 1993, and approved by the Court on June 21, 1993, the parties having stipulated that the appeal of T.I. Construction Company, Inc., for a trial *de novo* of the Arbitration Award entered on March 17, 1993, Counts I, IX and XI of the Second Amended Complaint and defendants' Counterclaim was withdrawn, IT IS ORDERED as follows:

1. JUDGMENT IS ENTERED on the Award of Arbitrators dated March 17, 1993, in favor of Kiewit Eastern Company, Perini Corporation and Kiewit/Perini, a joint venture, and against plaintiff, T.I. Construction Company, Inc., on the claims set forth in Counts I, IX and XI of the Second Amended Complaint;

2. JUDGMENT IS ENTERED on the Award of Arbitrators dated March 17, 1993, in favor of counterclaim-plaintiffs, Kiewit Eastern Company, Perini Corporation and Kiewit/Perini, a joint venture, and against counterclaim-defendant, T.I. Construction Company, Inc., in the amount of $36,155;

3. Pursuant to this Court's Order of December 9, 1992, granting the Motion of defendants, Kiewit Eastern Company, Perini Corporation and Kiewit/Perini, a joint venture, for partial summary judgment on Counts II, III, IV, V, VI, VII, VIII, X, XII and XIII, judgment not having been entered following the granting of the Motion in accordance with Federal Rule of Civil Procedure 56(d) because of other claims against the said defendants, and judgment having been entered by this Order on all remaining claims, JUDGMENT IS ENTERED in favor of Kiewit Eastern Company, Perini Corporation and Kiewit/Perini, a joint venture, and against plaintiff, T.I. Construction Company, Inc., on Counts II, III, IV, V, VI, VII, VIII, X, XII and XIII of the Second Amended Complaint;

4. Pursuant to this Court's Order of August 5, 1992, in which the Motion of defendants, Kiewit Eastern Company, Kiewit/Perini, Perini Corporation, a joint venture, among others, was granted with respect to Count XV of plaintiff's Second Amended Complaint, no judgment having been entered pursuant to Federal Rule of Civil Procedure 56(d) because of other claims against the said defendants, and judgment having been entered by this Order on all remaining claims, JUDGMENT IS ENTERED in favor of defendants, Kiewit Eastern Company, Kiewit/Perini, Perini Corporation, a joint venture, and against plaintiff, T.I. Construction Company, Inc., on Count XV of plaintiff's Second Amended Complaint;[1] and,

---

[1] By this Court's Order of August 5, 1992, the action was dismissed as to the remaining defendants, Hank Adams, Glenn Christensen, Dick Stermer, Mark Keppeler and Raymond Roth, because they were named as defendants in Count XV of plaintiff's Second Amended Complaint only.

5. JUDGMENT IS ENTERED in favor of defendants, Kiewit Eastern Company, Kiewit/Perini, Perini Corporation, a joint venture, and against plaintiff, T.I. Construction Company, Inc., on Count XiV of plaintiff's Second Amended Complaint by reason of the entry of judgment, as aforesaid, on Counts I through XIII and XV of the Second Amended Complaint.[2]

BY THE COURT:

/s/ Jan E. Dubois
JAN E. DUBOIS, J.

---

[2] Count XIV of the Second Amended Complaint is entitled "Request for Attorney Fees" and is based on Section 20 of the Subcontract between the parties which provides for payment of counsel fees to the prevailing party. T.I. Construction Company, Inc., is not a prevailing party in this litigation.

FEDERAL HIGHWAY ADMINISTRATION

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM ADMINISTRATION PARTICIPANT'S MANUAL

FOREWORD

It is a pleasure for me to provide you with the Federal Highway Administration's (FHWA) Disadvantaged Business Enterprise (DBE) Program Administration Participant's Manual. This Manual contains very useful, timely information for Federal and State personnel who are responsible for the administration of the Federal-aid highway DBE program.

The Manual is the primary teaching aid for the DBE Program Administration Training course (National Highway Institute Course #36117). The DBE practitioners who have completed this course have been positively impressed with its value in clarifying a very complex and challenging program area. I strongly recommend the Manual's use for instructional purposes as well as for guidance and direction in administering the DBE program. Let me emphasize that the material in this Manual does not impose new or additional requirements upon the field offices or the States beyond what is already required by Federal laws and regulations.

I am confident you will find the Manual to be an invaluable resource in carrying out your daily DBE program responsibilities and in accomplishing the objectives of this vital program.

/s/ Thomas D. Larson
Thomas D. Larson
Federal Highway Administrator

INTRODUCTION

The material presented in this manual is intended for training purposes and daily use by Federal and State employees with Disadvantaged Business Enterprise (DBE) program responsibilities. These guidelines are a compilation of FHWA regulations, interpretations, and policy issuances and reflects customary State practices. The material in this manual does not impose new or additional requirements in the DBE program. The Federal Highway Administration and the States should continue to exercise flexibility as necessary to address particular needs of individual States consistent with applicable Federal laws, regulations, policies and procedures. The only mandatory material in the manual is that which is currently mandated by law or regulation. Within this context, the manual should prove to be an excellent training guide and reference source for carrying out the DBE program.

The responsibility for the DBE Program is shared jointly by the FHWA, State Transportation/Highway Agencies, prime contractors, and DBE firms. These guidelines are issued to clarify the DBE program requirements and ensure uniform implementation of the program on a day-to-day basis.

Preparation of this Manual represents a joint effort by the Office of Civil Rights and the Office of Highway Operations, Federal Highway Administration 400 7th Street, SW, Washington, D.C. 20590. For information or additional copies, please phone (202) 366-1605.

* * *

IV. REPLACEMENT/SUBSTITUTIONS OF DBE'S

A. The prime contractor is required to have a valid arrangement with the DBE(s) designated in the proposal to fulfill the contract goal. The prime contractor will be allowed to substitute the originally-designated DBE(s) only if it is demonstrated to the State that the DBE(s) is unable or unwilling to perform. The contractor's ability to negotiate a more advantageous contract with another subcontractor will not be considered a valid basis for the substitution.

B. If a DBE is unable or unwilling to perform, the prime contractor shall notify the State in writing and include documentation to justify the substitution, including a statement from the DBE to be replaced acknowledging the substitution. The prime contractor will also identify the replacement DBE or document good faith efforts to replace the DBE with another. One practice which has been employed by some States to expedite the replacement of DBE's unable or unwilling to perform is to require that DBE to find its own replacement. The prime contractor shall notify the State of instances where the DBE originally designated to perform the work does not agree to the substitution, cannot be located, or fails to respond.

C. If the State deletes or reduces the DBE's intended work, the prime shall not be required to designate other items for DBE participation but is encouraged to do so. Other DBE Commitments on the project remain in effect.

G. Regardless of the prime contractor's DBE participation percentage (above or below the contract figure) committed at the award of the contract, the prime contractor is to exert the necessary good faith efforts to replace/substitute DBE's for those DBE's unable or unwilling to perform during the life of the contract.

V. GOOD FAITH EFFORTS 49 CFR 23, Appendix A

A determination of "good faith efforts" becomes necessary when at the time of contract award, the low bidder does not propose to meet the project goal and if, during the execution of the contract, the planned subcontracts to DBE firms do not materialize. The FHWA must concur in the State's decision concerning the adequacy of the bidder's good faith efforts to meet the DBE goal at the time of concurrence in award. Basic guidance on good faith efforts is found at 49 CFR 23, Appendix A, *Guidance Concerning Good Faith Efforts.* Determination of good faith efforts requires full knowledge of all of the facts involved. The State's decision concerning the adequacy of the bidder's good faith efforts must be documented in a satisfactory manner in its files. The bidders must have exerted efforts that were of an intense, aggressive and sincere nature for that specific project far beyond any simple paper work exercise to demonstrate a good faith effort in achieving the project goal. Attachment B provides an analysis of good faith efforts. Good faith determinations should include, but not be limited to: